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Concerning
The Use of Material Witness Warrants

before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives

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Chairman Coble, Ranking Member Scott, and Members of the Subcommittee,

Thank you for the opportunity to testify at this important hearing regarding the use of material witness warrants in criminal investigations. I appreciate the opportunity to testify today and will begin by addressing four prime misconceptions surrounding material witness warrants.

First, material witness warrants are not a creation of the USA PATRIOT Act. To the contrary, the use of material witness warrants to secure the testimony of witnesses, before a grand or petit jury, is a long-standing practice that is authorized by statute and that predates the USA PATRIOT Act by many years. Nor have material witness warrants been issued solely in terrorism investigations; for years courts have issued such warrants in matters ranging from alien-smuggling to organized crime investigations.

Second, the Department of Justice cannot unilaterally arrest someone as a material witness. Rather, a material witness can only be arrested if a judicial officer issues a warrant authorizing the arrest, based upon an application from the government that establishes probable cause to believe that a witness's testimony is material and that it would be impracticable to secure that witness's appearance by subpoena.

Third, material witnesses are not held incommunicado. A material witness has the right to be represented by an attorney, and can challenge his or her confinement in court. Counsel will be appointed if the material witness cannot afford to pay for a lawyer.

Fourth, once a material witness gives full and complete testimony, he or she is generally released, barring some other source of authority for continued detention (such as an immigration

detainer or criminal charges). Indeed, some material witnesses are released without testifying before the grand jury. For instance, if following the arrest of a material witness he or she provides information to federal agents and prosecutors and they determine either that the witness does not have information that would be useful to the grand jury or that the information provided by the witness can be presented to the grand jury in another form, the witness is then released by the court.

Permit me to turn to the material witness statute and related provisions. Specifically, 18 U.S.C. 3144 provides that a *judicial officer* may order the arrest of a person whose testimony appears to be material in a criminal proceeding if there is a showing - pursuant to the probable cause standard - that it may become impracticable to secure the presence of the person by subpoena (e.g., the person is likely to flee the United States or go into hiding if subpoenaed to testify). Further, once the warrant is issued and the witness is arrested, a *court* employs the standards in the Bail Reform Act, 18 U.S.C. 3142, to decide whether to detain the witness pending his or her testimony. The material witness is entitled to a speedy detention hearing before the court at which he or she is represented by counsel, can present evidence, and can cross-examine government witnesses, see 18 U.S.C. 3142(f), and the government must establish that "no condition or combination of conditions will reasonably assure the appearance of the person as required." 18 U.S.C. 3142(e). Moreover, judicial supervision does not end there. Under Federal Rule of Criminal Procedure 46(h), a court must supervise the detention of material witnesses to eliminate unnecessary detention, and an attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days, and explaining why the witness should not be released.

In short, there are numerous judicial safeguards built into the long-established practice of detaining material witnesses pursuant to a warrant. See *United States v. Awadallah*, 349 F.3d 42, 62 (2d Cir. 2003) (the material witness statute and related rules "require close institutional attention to the propriety and duration of detentions"). However, the material witness statute may not be used as a broad preventative detention law, to hold suspects indefinitely while investigating them without filing charges. That is not the purpose of the material witness statute. At the same time, the fact that a person who is detained as a material witness is also a suspect in the underlying criminal investigation should not prevent the Government from attempting to obtain the person's testimony through lawful means. In other words, it may be perfectly appropriate to arrest and detain a suspect as a material witness if he or she in fact meets the statutory criteria contained in 18 U.S.C. 3144, as authorized by a federal judge. If a material witness before the grand jury is also a target of the grand jury's investigation, then pursuant to the United States Attorneys' Manual that witness will be advised of the right against self-incrimination, of the right to confer with counsel, and of the fact that the witness's conduct is being investigated for possible violation of federal criminal law.

In sum, Mr. Chairman, the material witness statute is an important, constitutional tool to secure the testimony of a witness whose testimony might otherwise not be available. It has a long

historical pedigree, and has been used repeatedly in terrorism and non-terrorism investigations alike. The pertinent statutes and related rules contain many safeguards, and the entire process is authorized and closely supervised by the Federal judiciary.

I look forward to answering any questions that Members of the Committee may have.